Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1396

In The

Supreme Court of the United States

OCTOBER TERM, 1980

JEANNE BRANDON, et. al.,

Petitioners,

— v. —

THE BOARD OF EDUCATION OF THE GUILDERLAND CENTRAL SCHOOL DISTRICT, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RESPONDENTS

CONRAD THEODORE CARLSON, III
Attorney of Record for Respondents
Tabner, Carlson, Daffner and Farrell
90 State Street
Albany, New York 12207
(518) 436-7643

TABLE OF CONTENTS

Page

Table of Cases i

Summary of Argument 1

Argument 2

Petitioners' Authorities Distinguished 13

Conclusion 18

Table of Cases:

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 2, 3, 6, 7, 10, 12

Chamberlin v. *Dade County Board of Public Instruction*, 374 U.S. 487 (1963) 377 U.S. 402 (1964) 2

Commissioner of Education v. *School Committee of Leyden*, 267 N.E. 2d 226, at page 228 (1971) cert denied 404 U.S. 849 (1971) 6, 9, 13

Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) 12, 14

Decker v. *Dundee Central School District*, 4 NY 2d 462 (1958) 14

Despain v. *DeKalb County Community School District*, 384 F 2d 836 (Seventh Circuit) cert denied, 390 U.S. 906 (1968) 2, 8

Engel v. *Vitale*, 370 U.S. 421 (1962) 2, 3, 6, 10, 12

Everson v. *Board of Education*, 330 U.S. 1 (1947) 3, 5

Garber v. *Central School District No. 1*, 251 App.Div. 214 (Third Department, 1937) 15

Garvin v. *Rosenau*, 455 F2d 333 (Sixth Circuit, 1972) ... 16

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 15

Hunt v. *Board of Education of County of Kanawha*, 321 F. Supp. 1263 (S.D. W. Va., 1971) 7, 8, 13

Page

ISKCON v. *Wolke*, 453 F. Supp. 869 (E.D. Wisc., 1978) .. 17

Johnson v. *Huntington Beach U. High Sch. Dist.*, 137 Cal. Reptr. 43 (1977), cert denied 434 U.S. 877 (1977) 10, 11, 13

Keegan v. *University of Delaware*, 349 A 2d 14 (1975), cert denied 424 U.S. 934 (1976) 8, 9

Kent v. *Commissioner*, _____ Mass. _____, (No. 2087) 402 N.E. 2d 1340 (1980) 6, 7, 9, 13

Lauricella v. *Board of Education*, 52 AD2d 710, Case No. 2 (App. Div. Fourth Department, 1976) 14

Lawrence Univ. Bicentennial Commission v. *Appleton*, 409 F. Supp. 1319 (E.D. Wisc., 1976) 16

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 9, 12, 14

Malnak v. *Yogi*, 592 F2d 197 (Third Circuit, 1979) 12

Mangold v. *Albert Gallatin A. Sch. Dist.*, 438 F 2d 1194 (Third Circuit, 1971) 2, 7, 8

McCollum v. *Board of Education*, 333 U.S. 203 (1948) 3, 4, 5, 10

Meek v. *Pittenger*, 421 U.S. 349 (1975) 14

Pell v. *Procunier*, 417 U.S. 817 (1974) 15

People v. *Johnson*, 6 NY 2d 549 (1959) 15

People v. *Sprowal*, 49 Misc 2d 806 (1966) 15

Reed v. *Van Hoven*, 237 F Supp 48 (W.D. Mich. S.D., 1965) 10, 13, 14

Resnick v. *East Brunswick Township Board of Education*, 77 N.J. 88, 389 A 2d 944 (1978) 17

Roemer v. *Maryland Public Works Board*, 426 U.S. 736, 49 L Ed 2d 179 (1976) 8

Sloan v. *Lemon*, 413 U.S. 825 (1973) 14

Stacy v. *Williams*, 306 F. Supp. 963, (N.D. Miss., 1969) .. 16

Page

State Board of Education v. *Board of Education of Netcong*, 57 N.J. 172, cert denied 401 U.S. 1013 (1971) 6, 8, 13

Stein v. *Oshinsky*, 348 F 2d 999 (Second Circuit) cert denied, 382 U.S. 957 (1965) 2, 5, 6, 8, 9

Stone v. *Graham*, _____ U.S. _____, 66 L Ed 2d 199 (1980) 11

Trietley v. *Board of Education of the City of Buffalo*, 65 AD 2d 1 (Fourth Department, 1978) 11, 13

Vincent (Chess) v. *Widmar*, _____ F 2d _____, (Eighth Circuit, 1980) reversing 480 F Supp. 907 (W.D. Missouri 1979) Cert granted Feb. 23, 1981 9

Williams v. *Board of Trustees*, 204 App.Div. 566 (Fourth Department, 1923) tried a second time and reported 210 App. Div. 161 (Fourth Department, 1924) 15

Wolman v. *Walter*, 433 U.S. 229 (1977) 14

Zorach v. *Clauson*, 343 U.S. 306 (1952) 5, 10

No. 80-1396

In The

Supreme Court of the United States

OCTOBER TERM, 1980

JEANNE BRANDON, et. al.,

Petitioners,

— *v.* —

THE BOARD OF EDUCATION OF THE GUILDERLAND CENTRAL SCHOOL DISTRICT, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RESPONDENTS

SUMMARY OF ARGUMENT

The decision below is in accordance with law as enunciated by this Court and by the Courts of the several Circuits. There does not appear to be a question of law which justifies the grant of a writ of certiorari in this matter.

Petitioner seeks to have the case reviewed upon the basis that the decision below conflicts with Establishment Clause principles articulated by this Court and other lower courts and upon the further basis that the decision below subordinates

settled principles of freedom of speech, freedom of association, freedom of religion, and equal protection to an erroneous construction of the Establishment Clause.

The respondents believe that the decision below is in keeping with the earlier decisions of this Court and of substantially all other courts which have been presented with similar issues over the past thirty years. It is respondents' contention that it would be constitutionally impermissible for the school district to grant permission to use a classroom for purposes as requested by the student petitioners.

ARGUMENT

There can be no doubt that the proposed actions of the students would be religious in nature. A reading of the complaint shows clearly the intention and desire of these students to carry out a religious activity. The proposed meetings are not for the purpose of *studying about* prayer or *studying about* religion, but rather to participate directly in prayers and religious activities.

Were the school district to direct or require such activity, there could be little doubt that the action of the school district would be in violation of the Constitution. This has been so stated many times. *Engel* v. *Vitale*, 370 U.S. 421, (1962); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Chamberlin* v. *Dade County Board of Public Instruction*, 374 U.S. 487 (1963) and 377 U.S. 402 (1964); *Despain* v. *DeKalb County Community School District*, 384 F 2d 836 (Seventh Circuit) cert denied, 390 U.S. 906 (1968); *Stein* v. *Oshinsky*, 348 F 2d 999 (Second Circuit) cert denied, 382 U.S. 957 (1965). *Mangold* v. *Albert Gallatin A. Sch. Dist.*, 438 F 2d 1194 (Third Circuit, 1971).

Petitioners seek to avoid the prohibition of *Schempp* and *Engel* upon the basis that the action of the pupils is voluntary. The United States Supreme Court addressed the issue of voluntariness in both cases. In *Schempp* it was stated:

> "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel* v. *Vitale*, supra (370 US at 430). Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon became a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson*, supra (330 US at 65)." *Abington School District* v. *Schempp*, supra, at pages 224 and 225.

Also in *Engel*, the court stated:

> "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitation of the Establishment Clause . . . The Establishment Clause, unlike the Free Exercise Clause does not depend upon any showing of direct governmental compulsion and it is violated by the enactment of laws which establish an official religion *whether those laws operate directly* to coerce nonobserving individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, supra, at pages 430 and 431. (emphasis supplied).

The concurring opinion of Mr. Justice Douglas quotes at length from the dissent of Mr. Justice Rutledge in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). This quotation includes references to Jefferson and Madison and states in part:

> "The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state." *Engel* v. *Vitale*, supra, at page 444.

Although the court in *Engel* does not rely upon the decision in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), that case also bears upon the issues here. There the attendance upon religious classes conducted in the public schools was voluntary,

although records of attendance were kept. Mr. Justice Black delivering the opinion of the court found that there was tax supported property used for religious instruction and that the operation of the state's compulsory education system assisted the program of religious instruction. In the concluding paragraph of his opinion, Mr. Justice Black stated:

> "Here not only are the state's tax supported school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's compulsory public school machinery. This is not separation of Church and State." *McCollum* v. *Board of Education*, supra, at page 212. (emphasis supplied)

The concurring opinion of Mr. Justice Frankfurter points out the pressures brought upon the child to attend the voluntary release time program and the consequences of such pressures.

> "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

> "As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages" *McCollum* v. *Board of Education*, supra, at pages 227 and 228.

Mr. Justice Jackson, who dissented in *Everson*, wrote a separate concurring opinion in *McCollum* in which he stated that the court "can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the school . . ." (page 235).

Although the court in *Everson* v. *Board of Education*, supra, found that providing for transportation to public and parochial schools was acceptable upon a pupil benefit theory, the court did make the often repeated pronouncement that is also applicable here:

> "Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for Church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson* v. *Board of Education*, supra, at pages 15 and 16.

Petitioners in the instant proceeding seek something other than that which was authorized in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). There the court upheld the New York release time program. One distinction demonstrated by the court was that in *Zorach* the students left the school buildings and school grounds and all costs were paid by the religious organization. The court points out that in *McCollum* public school classrooms were used for religious instruction, as they would be in the present instance.

In 1965 certiorari was denied in *Stein* v. *Oshinsky*, supra, which had similar facts to those in the case presently at issue. Shortly after that decision, the same issue was raised in the Commonwealth of Massachusetts. The Commissioner of Education brought a proceeding to enjoin the school committee

of Leyden from putting into effect a resolution making time available for free exercise of religion prior to the beginning of school. The highest court of the Commonwealth of Massachusetts determined that the voluntary religious exercises held on school property at the start of the school day with the permission of the school committee were prohibited, although there was no requirement for student or teacher participation. The court cited the *Stein* case and then stated that the broad language of *Schempp* has not been limited by the United States Supreme Court. The court then stated the law as we believe it should be stated here:

> "We think that, under the applicable First Amendment decisions, neither students nor teachers may be allowed to participate in the well-intended observances on school property authorized by the Leyden resolution." *Commissioner of Education* v. *School Committee of Leyden*, 267 NE 2d 226, at page 228 (1971) Cert denied 404 U.S. 849 (1971).

In March of last year the Supreme Judicial Court of Massachusetts considered the constitutionality of the following legislative enactment:

> "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of prayer may be offered by a student volunteer, and during any such period an excusal provision will be allowed for those students who do not wish to participate." (Statutes 1979 see 692).

The highest court of Massachusetts ruled in *Kent* v. *Commissioner*, _____ Mass. _____ (No. 2087) 402 N.E. 2d 1340 (1980) that a statute requiring that there be a period of prayer with participation by volunteers was not permissible. The court cited not only *Leyden* but also *Schempp*, *Engel*, and *State Board of Education* v. *Board of Education of Netcong*, 57 N.J. 172, cert denied 401 U.S. 1013 (1971).

In its opinion that court also addressed the issue of Free Exercise of religion. The court stated in part:

> "There are parents, argued the defendant, for whom religion is so far a necessary constituent of their daily lives that they find it hard to abide a school day for their children in which a religious impulse is not in some way given voice; and there may be children who themselves have the same intense diurnal religious need and involvement. It was suggested that to invalidate § 1A was to prohibit to such votaries the Free Exercise of religion (see note 4). The constitutional answer is that it is not unreasonable to ask those parents and children to find accommodation for their religious practices outside the classrooms of public schools, for example, in the home." *Kent* v. *Commissioner*, _____ Mass. _____ 402 N.E. 2d 1340 at page 1345 (1980).

On the Question of voluntariness, the court stated:

> "And, as has been repeatedly observed, the supposed is hardly a robust or realistic conception when the choice is made by impressionable youngsters inclined to conformity, or by parents fearful of the phychological effects on their children of requiring them to claim release from the morning prayer. See Brennan, J., concurring, in *Schempp*, 374 U.S. at 287-294." *Kent* v. *Commissioner*, _____ Mass. _____ 406 N.E. 2d 1340 at page 1345 (1980).

A similar result was reached in *Hunt* v. *Board of Education of County of Kanawha*, 321 F.Supp 1263 (S.D. W.Va., 1971). In *Hunt*, the court held that the school board had the right to prohibit the use of school facilities for all religious activities and the prohibition did not deny the pupils the right of freedom of speech, freedom of assembly or free exercise of their religious beliefs.

Also the Third Circuit Court of Appeals has ruled:

> "Neither the fact that participation by students in the program is 'voluntary', nor the fact that the program may be denominationally neutral, is of constitutional moment when the establishment clause is involved." *Mangold* v. *Albert Gallatin A. Sch. Dist.*, supra, at page 1195.

This case involved daily bible reading and non-denominational prayers by volunteer students.

The Supreme Court of the State of New Jersey in a decision which this Court refused to review, has held that it is unconstitutional for students to voluntarily join in religious exercise prior to the formal opening of school. A student volunteer would read from the "remarks" of the Chaplain taken from the Congressional Record. *State Board of Education* v. *Board of Education of Netcong*, 57 N.J. 172 (1970) cert denied 401 U.S. 1013 (1971).

Petitioners cite among their authorities *Keegan* v. *University of Delaware*, 349 A 2d 14 (1975) cert denied 424 U.S. 934 (1976). The highest court of the State of Delaware considered the *Stein* case and stated that it did not think that the decision in that case dictated a different result in *Keegan* indicating that in *Stein* impressionable children were involved. In *Keegan* the court also referred to *Hunt*. The court in *Keegan* found a difference in both *Hunt* and *Stein* from the situation in the case before it which involved university students living in a dormitory. The court stated:

> "The *Hunt* case, while lacking the coercive situation found in *Stein*, still involved commuting high school students meeting voluntarily in classrooms or other premises of a high school. Neither case involved activity by adult residents of a living complex in common areas generally set aside for the benefit of such residents." *Keegan* v. *University of Delaware*, supra, at page 18.

This Court also recognized the effect of the age of the student in *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 49 L Ed 2d 179 (1976) when in referring to the Lemon I it stated "the elementary and secondary schooling in Lemon I came at an impressionable age". (p. 764)

It appears that the Second Circuit in *Stein* previously and now in the instant case ruled that the activities sought by petitioner herein are constitutionally impermissible. The Third Circuit in *Mangold* and the Seventh Circuit in *Despain* ruled similar activities impermissible. The State of New Jersey in 1970 in *Netcong* and the Commonwealth of Massachusetts in

1971 in *Leyden* and in 1980 in *Kent* determined that such activity is impermissible. This Court declined to review those of the decisions brought to it. In 1975, the highest court of the State of Delaware (*Keegan*) acknowledged that there was a distinction between those cases involving grade school or high school pupils who commute to school and university students who reside on campus in living quarters set aside for their use.

Recently this Court has granted certiorari in *Vincent (Chess)* v. *Widmar*, _____ F 2d _____ (Eighth Circuit, 1980) (cert granted Feb. 23, 1981). In that action the court granted to college students the right to conduct religious services in the buildings of a tax supported state university. The court, however, acknowledged and distinguished the case at bar stating that with high school students there was a greater risk of entanglement of governmental authority in religious issues. Secondly, the court stated that university students relied on the college campus as their total community and therefore could expect a greater accommodation than could high school students.

That a distinction exists between those instances arising in the public school system and other areas where the First Amendment rights of religious freedom are concerned is acknowledged by Laurence H. Tribe in his publication cited by petitioners. This comprehensive text on constitutional law points out quite clearly in Chapter 14 that there is a "special place of public schools in American Life" and as Professor Tribe has stated "no major religious activity, however 'voluntary', has been allowed to take place" in the public schools.

Subsequent to *Stein*, *Leyden* and *Keegan* the issue of the right of a Bible class composed of high school students to meet and conduct religious activities was addressed by the courts of California. School officials rejected the request of the students. The court discussed *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and the tripartite test of that case. In finding that the school officials acted properly in rejecting the students' request, the court stated:

> "It is also apparent that if the club is permitted to meet and conduct its activities on the school campus as a student club as demanded by plaintiffs, state financial support would flow directly to the club. It would be entitled to use classroom space rent free, receive heat and light and would be monitored by a paid faculty sponsor. The district would also be obligated at its expense to audit club finances. One of the factors differentiating McCollum from Zorach was the free use of school facilities, classrooms, heat and light. (Zorach v. Clauson, supra, 343 U.S. 306, 308-309, 72 S.Ct. 679, 96 L.Ed. 954). Thus this financial subsidy alone may be sufficient to compel constitutional condemnation of the requested state action.
>
> We do not rest our decision, however, on financial aid alone. The 'primary effect' test bespeaks not only of financial assistance but also necessarily inquired whether the consequence of state action is to place its imprimatur upon the religious activity. (Abington School District v. Schempp, supra, 374 U.S. 203, 216-219, 221-222, 83 S.Ct. 1560, 10 L.Ed.2d 844; Engel v. Vitale, supra, 370 U.S. 421, 430-436, 82 S.Ct. 1261, 8 L.Ed.2d 601. See also: Reed v. Van Hoven, supra, 237 F.Supp. 48, 51-53.) This aspect of the effect test reaches the essence of the Establishment Clause proscription."

and also:

> "The point is that impermissible governmental support is present when the weight of secular authority is behind the dissemination of religious tenets." *Johnson* v. *Huntington Beach U. High Sch. Dist.*, 137 Cal. Reptr 43 (1977), cert denied, 434 U.S. 877 (1977), at pages 49 and 50.

The court then considered the issues of excessive state entanglement and the potential for divisiveness. On these issues the court stated:

> "Students who are members of less orthodox religions may be unable to organize a club because of insufficient student support or unavailability of a faculty sponsor. In such event, the free exercise rights of the minority might well be infringed by the pressure upon them to conform to the beliefs of the recognized religious club. Even if we assume that the spectrum of religious beliefs present in the national community is represented at the school, there is a real possibility that competing sects or beliefs will vie

> for school permission to operate on campus. Manifestly this could engender student divisiveness in matters of religious beliefs."

and also:

> "The school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization. This, the First Amendment will not permit." *Johnson* v. *Huntington Beach U. High Sch. Dist.*, supra, at pages 50 and 51.

The most recent decision of this Court on the issue of school and religious entanglement is *Stone* v. *Graham*, _____ U.S. _____, 66 L Ed 2d 199 (1980). This Court held that there was no secular purpose in posting the Ten Commandments in the classroom and that such posting serves no educational function. The Court then stated:

> "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone* v. *Graham*, supra, 66 L Ed 2 199, at page 202.

Recently the Courts of New York State have ruled on issues almost identical to those in the case presently under consideration. In *Trietley* v. *Board of Education of the City of Buffalo*, 65 AD 2d 1, (Fourth Dept., 1978) high school students sought permission from the Board of Education to form Bible clubs at three public high schools. The Superintendent of Schools and the Board of Education denied the request of the students. An Article 78 Proceeding to review the determination followed. In a unanimous decision the Appellate Division ruled that under the Education Law of the State of New York the Board of Education had *no authority* to grant the students' request. (Although a notice of appeal was filed, the Court of Appeals of the

State of New York has advised that the appeal was never perfected and has been dismissed).

The court found that even if the Board of Education had the authority to grant the students' request, that the Board of Education need not do so. The court then found that the proposed activities would violate the Establishment Clause of the First Amendment. Finally the court rejected the students' claim that their "First Amendment right of free exercise of their religion and freedom of expression and association" had been infringed upon.

In *Malnak* v. *Yogi*, 592 F2d 197 (Third Circuit, 1979), the Circuit Court of Appeals for the Third Circuit considered the teaching of a course called "Science of Creative Intelligence - Transcendental Meditation" in the New Jersey Public High Schools. The course was an elective at five high schools and was taught by teachers trained by the World Plan Executive Council - United States.

The Circuit Court found that the course was religious in nature and affirmed the decision of the District Court holding that the teaching of SCI/TM in public schools was prohibited. Citing *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), *Abington Township* v. *Schempp*, supra, and *Lemon* v. *Kurtzman*, supra, the Circuit Court held that this program provided for governmental aid to teach the course in question and the use of public school facilities which constituted excessive governmental entanglement with religion. Thus the court in *Malnak* v. *Yogi*, supra, denied the right of the school district to have religious activities in the public school.

In a concurring opinion Judge Adams observed that although there were "elements of involuntariness present in *Engel* and *Schempp*", that the SCI/TM courses were an elective and were entirely voluntary. This, however, was not sufficient to permit the courses to continue. The court concluded the concurring opinion by stating that the program was forbidden by the First Amendment.

PETITIONERS' AUTHORITIES DISTINGUISHED

Petitioners have cited as authority for permitting the prayer meetings of the students the case of *Reed* v. *Van Hoven*, 237 F Supp 48 (W.D. Mich. S.D., 1965). This is the only case cited by plaintiffs where the factual situation resembles that of the case at bar.

In *Reed* plaintiffs brought an action claiming that the practices in the Jensen Public Schools violate both the Free Exercise and Establishment Clauses of the First Amendment. Plaintiffs sought an injunction to prevent the continuation of the practice of permitting meetings by pupils in the schools for the purpose of praying together. The defendants moved for summary judgment. The court denied the defendants' request for summary judgment and denied the plaintiffs' request for an injunction.

The court established an elaborate and complicated interim plan for the conduct of the meetings for prayer. This plan would of necessity involve a great deal of entanglement with the school program and would require the use of teachers for maintaining order. Included in the interim plan was a time schedule for the sounding of bells and an elaborate method for co-mingling of the student body so that no one would know who had congregated for the purpose of prayer. Counsel has been unable to trace this case past the interim decision of the District Court.

If we are to assume that this plan or policy of the District Court became the final action of the court and is currently being implemented, the result is certainly contrary to the rulings of the Second Circuit, the Third Circuit and the Seventh Circuit, the Supreme Court of Massachusetts in *Leyden* and *Kent*, the Courts of California in *Johnson* v. *Huntington Beach U. High Sch. Dist.*, supra, the Courts of New Jersey in *State Board of Education* v. *Board of Education of Netcong*, supra, the Courts of New York in *Trietley*, supra, and the District Court of the Southern District of West Virginia in *Hunt*. In fact *Reed* v. *Van Hoven*, supra, seems to stand alone.

The plan or policy that the court provided in *Reed* for would require a revision of the school procedures at Guilderland High School including at least a change in the bus schedules and the starting or ending time of classes. Transportation schedules and starting and ending times of classes of all schools in a central school district are all interrelated and are built around the need to transport pupils to the several widely separated schools of the district which vary in size and pupil population. A plan such as is set forth in *Reed* involves a high degree of entanglement and great involvement on the part of the administration and the entire student body and staff. Regulations and procedures would be required as to the opening of classrooms, the use of the rooms by pupils between the arrival of buses and the commencement of the homeroom period or classes, and the use of classrooms by the teachers. Pupil supervision would be required during this time span. Merely determining the proper place for the individual students would be a problem. They cannot be allowed to wander at will through the complex of buildings with over a hundred classrooms. Involvement of this magnitude by the administration, the teachers and hall monitors would be contrary to the holdings of the Supreme Court in *Lemon* v. *Kurtzman*, supra, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), *Sloan* v. *Lemon*, 413 U.S. 825 (1973), *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Wolman* v. *Walter*, 433 U.S. 229 (1977) and other similar cases.

The school districts of the State of New York have an obligation to provide adequate supervision of the pupils during all of the time they are in school and from the time they are picked up in the morning by school buses until they are returned home after school hours.

Decker v. *Dundee Central School District*, 4 NY 2d 462 (1958).

Lauricella v. *Board of Education*, 52 AD2d 710 Case No. 2 (App. Div. Fourth Dept., 1976).

Garber v. *Central School District No. 1*, 251 App. Div. 214 (Third Dept., 1937).

Williams v. *Board of Trustees*, 210 App. Div. 161 (Fourth Dept., 1924).

Williams v. *Board of Trustees*, 204 App. Div. 566 (Fourth Dept., 1923).

Substantially all of the other cases cited by the petitioners relate to non-prayer situations or situations other than those in a public elementary or secondary school. Certainly the distribution of hand bills on public streets or religious ceremonies in public parks or on public streets or the right to pickett on public property are a far different situation from the conduct of prayer meetings in the public schools which have been prohibited.

There are many alternatives available to the pupils to carry out their desire to pray together and to express their religious beliefs. In discussing First Amendment rights, the Court has held in the past that regulation may be necessary to further significant governmental interest. *Pell* v. *Procunier*, 417 U.S. 817 (1974), *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972).

Unlike a public park or a public street, the public nature of our schools has been limited by the courts of this state. The Court of Appeals of the State of New York in construing a loitering statute stated:

> "A school is in a sense public in that it is endowed and operated by the taxpayers' money, but it is not public in the sense that any member of the public may use it for his own personal purposes, and is justifiably the proper subject for proscribed acts such as loitering. A school building being of such a restricted public nature, the attack upon section 722-b on constitutional grounds is wholly without merit." *People* v. *Johnson*, 6 NY 2d 549 (1959) at page 552.

In a concurring opinion, Chief Judge Conway distinguished between the public nature of railroad stations and the public nature of schools. A few years later a court again limited the public nature of a school. *People* v. *Sprowal*, 49 Misc 2d 806 (1966).

Petitioners cite *Stacy* v. *Williams*, 306 F. Supp. 963, (N.D. Miss. 1969) as authority for their contention that they have a right to pray in the classrooms of the Guilderland High School. Although in that action the three judge court invalidated the regulations promulgated by the Board of Trustees of Mississippi's Institutions of Higher Learning, the court stated:

> "There should be little question, if any, that a university is not constitutionally compelled to permit outside religious groups to conduct public worship services on the campus". *Stacy* v. *Williams*, supra, at page 975.

Nowhere in the regulations proposed by the court is there any reference to prayers, praying or religion. Rather the regulations in the Appendix were addressed to "Free discussion of subjects of either controversial or non-controversial nature". The petitioners here have not sought to discuss religion. They have requested "to use a classroom before school for communal Prayer" (paragraph 9 of complaint). Petitioners also state:

> "Because Plaintiffs attend school together and because they believe that communal prayer prior to the commencement of their daily work is a most important exercise of their religion, they seek a place at school at which they may hold their meeting." Paragraph 15 of complaint.

It appears that the desire of the petitioners is to have public worship service in the school, which is specifically prohibited by the court in *Stacy* v. *Williams*, supra.

Lawrence Univ. Bicentennial Commission v. *Appleton*, 409 F. Supp. 1319 (E.D. Wisc., 1976) is cited as authority for appellants' right to pray in the high school classrooms. In that case the court ruled that Angela Davis could speak in the school gymnasium. This was not a case involving religion or prayer, nor was the speaker to be present during the school day when pupils were present to attend classes.

Similarly, *Garvin* v. *Rosenau*, 455 F2d 333 (Sixth Circuit, 1972) cited by appellants is a free speech or controversial issue

case and not one involving the Establishment Clause of the First Amendment. The students desired to establish a chapter of the Student Mobilization Committee at Redford High School in Detroit. The group opposed United States intervention in South East Asia. In fact the Circuit Court only ruled that the federal issue was not insubstantial and stated specifically "We express no opinion on the merits of the case . . .".

In *ISKCON* v. *Wolke*, 453 F. Supp. 869 (E.D. Wisc., 1978) cited by petitioners, the religious group was allowed access to "those areas of the terminal building at General Mitchell Field which are generally open to the public". These areas constituted a "public forum". Contrary to petitioners' contention, a public high school is not generally open to the public and does not constitute a public forum. Certainly a public high school is not a public forum during the time that students have assembled to attend classes.

Petitioners cite as authority for their right to use a classroom for prayer purposes *Resnick* v. *East Brunswick Township Board of Education*, 77 N.J. 88, 389 A 2d 944 (1978). In that appeal it appeared that Baptist, Lutheran and Hebrew religious organizations rented space in public schools for the purpose of conducting religious services and religious schools. In each instance the religious group not only paid rent, but more important the activities were not conducted during the school day. The Court took particular note of this latter fact. This distinguishes the case from that at bar wherein the students seek to use the classrooms immediately prior to the first class after the students begin to arrive for the school day.

CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter.

Respectfully submitted,

CONRAD THEODORE CARLSON, III
Attorney of Record for Respondents
Tabner, Carlson, Daffner and Farrell
90 State Street
Albany, New York 12207
Telephone: (518) 436-7643